No. 2616

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STIMSON MILL COMPANY, a corporation, Claimant of the Tow Boat "Tillicum," her Engines, Boilers, Tackle, Apparel and Furniture,

Appellant,

vs.

THE INLAND NAVIGATION COMPANY, a corporation, Claimant of the Steamer "Rosalie," her Tackle, Apparel and Furniture,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF AND ARGUMENT OF APPELLANT

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STATEMENT.

This controversy arises upon the libel of The Inland Navigation Company, owner of the steamship "Rosalie," against the tug "Tillicum," and upon the cross-libel of the Stimson Mill Company as owner of the tug, growing out of a collision which occurred

about a mile southeast of West Point lighthouse between the steamship "Rosalie" and a barge which was towed on the port side of the tug "Tillicum" in the early morning of April 8, 1911, and while a thick fog prevailed in the vicinity of the place of collision.

The "Rosalie," a freight and passenger boat plying between the ports of Bellingham and Seattle, was making her regular night trip southward from Bellingham to Seattle. Her usual speed while making this trip is about nine and one-half knots per hour (Apostles, pp. 41, 42, 43). She passed West Point light at 5:05 A. M. (Apostles, pp. 32, 39.) At that time a haze or very light fog was prevailing and the light at West Point was visible. She claims to have been giving her regular fog signal, one prolonged blast of her whistle, at the usual intervals. About three minutes after passing West Point light her lookout reported one whistle on the port bow (Apostles, p. 19), which was also heard by the mate then on duty in the pilot house (Apostles, p. 33). About a minute later another single whistle was heard and reported as coming from the same direction (Apostles, pp. 19, 33). After the usual interval of about a minute another whistle was heard ahead, this time the fog whistle of a tugboat with a tow (one long and two short blasts), followed by a danger signal from the tugboat, which was answered by a like signal from the "Rosalie" (Apostles, pp. 26, 33). At this time lights were seen a short distance ahead, and the bow of the "Rosalie" came in

collision with the bow of the barge lashed to the port side of the tug "Tillicum." According to the clock in the pilot house of the "Rosalie," this collision occurred at 5:10 A. M., five minutes after passing West Point light (Apostles, p. 33); and according to the testimony of Captain Hanson, the mate of the "Rosalie," the place of collision was about three-quarters of a mile southeast of West Point light (Apostles, p. 32).

The tug "Tillicum" left the Standard Oil Dock at the port of Seattle at 4:15 A. M. of said day, with Barge No. 8 made fast on her port side, the barge being loaded with two oil tank cars (Apostles, pp. 82, 92). This barge was 28 feet wide and 100 feet long, and was so loaded as to be higher in front. The cars were lashed upon tracks on the barge, one in front of the other. The tugboat proceeded on her usual course towards Marysville. A thick fog prevailing, she gave her fog signals at regular intervals. As she proceeded along under Magnolia Bluff and near the vicinity of Four-Mile Rock, she slowed down to about three miles an hour, for the purpose of locating her position by the echoes from the bluff, so that she might know when to change her course to pass West Point light (Apostles, pp. 83, 94). Pilot Anderson was on duty, navigating the tugboat, and Captain Charlesworth was in the pilot house acting as lookout. After proceeding at this speed for about five minutes, having heard no whistle from any other vessel, she got an echo of her own whistle from some object ahead of her. She

immediately stopped her engine and drifted until the next whistle was given, when the echo from ahead was repeated and at about the same time the lights of the "Rosalie" appeared a short distance ahead. She thereupon reversed full speed astern, and immediately gave the danger signal, as provided by Rule 3, Article 18, of the Pilot Rules, followed by three whistles to give information that she was going full speed astern, and her danger signal was answered by a danger signal from the "Rosalie" (Apostles, pp. 84-86). A collision followed, and damages were suffered both by the "Rosalie" and the barge. Each is seeking in this proceeding to recover from the other the damages suffered by it.

According to the clock of the "Tillicum" the collision occurred at 5:15 A. M. (Apostles, p. 91), and its officers estimate the place of collision at about a mile to a mile and a quarter southeast of West Point light (Apostles, pp. 107, 108).

It may be added that after each of the vessels had ascertained that no serious injury was done to the other, the "Rosalie" proceeded on her course to Seattle and the "Tillicum," having made fast the lashings of the barge which had been parted by the collision, proceeded on its course toward West Point. According to the testimony of the master and the mate of the "Tillicum," they shortly passed out of the fog bank, when they could see West Point light distinctly, distant about a mile or a mile and a quarter (Apostles, pp. 107, 108).

From the undisputed facts in this case it becomes

evident that a dense fog was lying over the port of Seattle and extending northward over the water along Magnolia Bluff, and that farther to the westward and northward a very slight fog or haze only prevailed. It was for this reason doubtless that the "Rosalie" heard on each of the occasions mentioned by its officers but one of the three whistles (one long and two short) given with each signal of the "Tillicum." In other words, the two short whistles following the long blast were evidently deflected sufficiently so that the sound waves did not reach the "Rosalie." In like manner the whistles of the "Rosalie," given before she entered the denser fog bank which at all times enveloped the "Tillicum," were manifestly deflected and were not heard on the "Tillicum" until the alarm signal given by the "Rosalie" just before the collision. This is not an unusual phenomenon, as is well known to all navigators and fully recognized in numerous opinions of admiralty courts.

The Lepanto, 21 Fed. 656.
Quinette v. Bisso, 136 Fed. 832.
Moore on Facts, Vol. 1, Sec. 273 *et seq.* and cases cited.

In the trial court it was contended by claimant (appellant here) that the "Rosalie" was at fault (1) in navigating at an excessive rate of speed; (2) in navigating without due caution after hearing a steam vessel forward of her beam whose course and position were not ascertained, (3) in failing to give

proper signals when it became apparent that the course and intention of the approaching vessel was not understood.

On behalf of the libelant (appellee here) it was contended that the tug "Tillicum" was at fault (1) because she did not have a proper lookout and (2) because she did not stop and reverse in time.

The trial court held that the "Rosalie" was at fault for not navigating with due caution after hearing a steam vessel forward of her beam, but did not pass upon the question of her alleged fault in navigating at an excessive rate of speed. In respect to the "Tillicum" the trial court held that as soon as its officers heard the echo from the object ahead they stopped its engines and navigated with caution; but held that the "Tillicum" did not have a proper lookout.

The damages of the "Rosalie" were found by the Court to be $5116.12, and those of the "Tillicum" and scow to be $597.30, a total of $5713.42; and the Court held that the damages should be equally divided. A judgment was accordingly entered in favor of the libelant for $2856.71. From this judgment the appellant prosecutes this appeal and makes the following

ASSIGNMENTS OF ERROR.

First.—The court erred in holding that the towboat "Tillicum" was at fault for not having an additional lookout stationed at her bow.

Second.—The court erred in holding that the lookout maintained by the towboat "Tillicum" in her pilot house was not a proper and sufficient lookout.

Third.—The court erred in holding that the towboat "Tillicum" and her barge had not overcome their forward motion at and prior to the collision of the "Rosalie" therewith.

Fourth.—The court erred in holding that the towboat "Tillicum" and her barge were not making sternway at the time of the collision.

Fifth.—The court erred in holding that the failure of the "Tillicum" to maintain a lookout at her bow was a fault contributing to the collision.

Sixth.—The court erred in holding that the improper navigation of the steamship "Rosalie" was not the sole cause of said collision.

Seventh.—The court erred in refusing to hold that the burden of proof was upon the "Rosalie" to show that her fault was not the sole cause of said collision.

Eighth.—The court erred in finding and decreeing that damages should be divided.

Ninth.—The court erred in finding the damages sustained by the "Rosalie" were grossly in excess of her actual damage.

Tenth.—The court erred in refusing to award to the cross-libelant its full damages and costs.

ARGUMENT.

I.

The Faults of the "Rosalie."

(Assignments Sixth and Seventh.)

Since the trial court held the "Rosalie" at fault and no cross-appeal has been taken by libelant, it might at first blush appear to be unnecessary to here review the faults of the "Rosalie." The trial court, however, appears to have rested his finding and judgment solely upon the ground that "the 'Rosalie' did not navigate with due caution after hearing a steam vessel forward of her beam." She, in fact, committed other and even greater faults. If these faults constituted express violations of the statute and were of so grave a character as in themselves to sufficiently account for the collision, the burden is, we think, on her to show that they did not constitute the sole cause.

The rule is, we think, correctly expressed in a recent decision of the District Court for the District of Oregon in the case of *The Thielbek,* 218 Fed. 251, 254:

> "Her fault was sufficient to account for the accident, and she is not permitted to escape liability by raising a doubt regarding the movements of the Ocklahama. * * * Any doubts arising from her [the Ocklahama's] movements, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

See also:

The North Point, 205 Fed. 958.

The Providence, 98 Fed. 134.

The H. F. Dimock, 77 Fed. 230.
The Pennsylvania, 19 Wall. 125, 136.
The Britannia, 153 U. S. 130, 143.
The Beaver, 197 Fed. 869.

The excessive speed of the "Rosalie" not only violated Article 16 of the International Rules, which provides that "every vessel shall, in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard to the existing circumstances and conditions"; but was in itself quite sufficient to account for the collision, notwithstanding the fault attributed by the court to the "Tillicum" in not having a lookout stationed at her bow.

A brief consideration of the testimony offered on behalf of the "Rosalie" itself will clearly demonstrate that she was proceeding into a fog of increasing density at an excessive rate of speed. It is admitted that the usual rate of speed of the "Rosalie" was nine and one-half knots per hour (Apostles, pp. 23, 41, 42). The mate, who was on duty in the pilothouse, testified that the collision occurred about three-quarters of a mile on this side (towards Seattle) of West Point (Apostles, p. 32). He further testified as follows:

"Q. Did you hear any whistles ahead of you, captain, after passing West Point light?
A. Well, not when I passed; but after three minutes I heard a whistle ahead." (Apostles, p. 33.)

This would be 5:08 by the "Rosalie's" time. He then claims to have stopped the engines and drifted about a minute, when he again signaled full speed

ahead (Apostles, p. 33). This would be by the "Rosalie's" time 5:09. He further testified that at that time he heard another whistle ahead, and thereupon reversed his engines. He next heard a tow whistle ahead, followed by a danger signal, and adds: "I saw a red light just about the time they blowed their danger signal, and I blowed at the same time I seen that."

"Q. About what time did you come in collision?
A. 5:10.
Q. How long, captain, to your best judgment, do you think you had been backing your boat before you came in contact with that scow?
A. Backing about a minute." (Apostles, pp. 33, 34.)

Thus from 5:05 to 5:09 he was proceeding on his course into a fog of increasing density, and during approximately a minute of that time he claims to have stopped his engines. According to his testimony, he had traveled up to the time of the collision at 5:10 three-quarters of a mile. If the testimony of the officers and crew of the "Tillicum" as to the place of the collision is to be accepted, this distance was not less than a mile (Apostles, pp. 107, 108). Assuming, however, that the distance was only three-quarters of a mile, that distance was covered by the "Rosalie" in five minutes, during which period, as claimed by her officers and crew, she had stopped her engines approximately one minute and had been reversing for approximately another minute. To cover this distance in five minutes the "Rosalie" must have traveled at an average rate of speed of

nine knots an hour. It becomes evident, therefore, that she was proceeding into this fog at a grossly excessive and negligent rate of speed and was guilty of violating an express provision of the statute.

The Louisiana, 2 Benedict, 371.
The Luray, 24 Fed. 751 (5½ miles an hour).
The Umbria, 166 U. S. 404.
The Martello, 153 U. S. 70 (5 or 6 miles an hour).
The Providence, 98 Fed. 132 (5 miles an hour).
The Niagara, 77 Fed. 329 (8 or 10 knots—fog as a medium).

The "Rosalie" also violated the second paragraph of Article 16 of the International Rules, which provides that

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

According to her own testimony she heard a single whistle slightly on her port bow in the fog ahead of her about three minutes after passing West Point light. She claims to have stopped her engines for nearly a minute, when, hearing no further whistle ahead, she proceeded on her course (Apostles, pp. 19, 33). She was, therefore, guilty of the fault attributed to her by the trial court.

The "Rosalie" also violated Rule 3 of Article 18 of the International Rules, which provides that

"If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle."

According to her testimony, on hearing the second single whistle on her port bow, the mate of the "Rosalie" stopped her engines, and then reversed them, without giving the signal prescribed by this rule (Apostles, pp. 43, 44). Whatever the density of the fog immediately about him, it must have been evident that a dense bank of fog lay ahead. In that fog bank he knew there was a vessel in motion, whose position, course and intention he then had no means whatever of discovering. It was, therefore, his plain duty to give several short and rapid blasts of his whistle (Rule 3, Art. 18, *supra*) followed by three short blasts, which would have advised the boat ahead of him that he had reversed his engines (Pilot Rules for Harbors and Inland Waters, p. 18). Had he done so, his whistles would doubtless have been heard by the "Tillicum" as he advanced into the fog where its density was practically the same as that enveloping the latter vessel.

These faults of the "Rosalie" being in themselves sufficient to account for the collision, the trial court erred in not placing upon her the sole responsibility therefor.

II.

The Court Erred in Holding that the "Tillicum" Had not Overcome Her Forward Motion at the Time of the Collision.

(Assignments Third and Fourth.)

While that fact was not predicated as a fault to the "Tillicum," because she did in fact observe all the rules above cited, yet we think its consideration is material in determining whether the faults of the "Rosalie" sufficiently account for the collision.

According to the testimony, for about five minutes prior to the collision the "Tillicum" had been slowed down to a speed of three knots an hour (Apostles, pp. 94, 104). Her officers did not hear the fog whistles of the "Rosalie," evidently because these whistles were given before the "Rosalie" entered the denser fog bank surrounding the "Tillicum," lying along the shore of Magnolia Bluff, and were deflected by this fog bank. Their first knowledge that any object was ahead of them in the water was an echo from their own fog whistle (Apostles, pp. 84, 95). Pilot Anderson says: "We got the echo pretty near dead ahead, approximately dead ahead, a faint echo." This does not bring their situation within either Article 16 or 18 of the International Rules above quoted. If they had heard a fog whistle they would have known that a vessel in motion was ahead of them. The echo of their own whistle disclosed that some object was ahead, which they naturally assumed to be a vessel; but whether it was at anchor, adrift, or under canvas, or was a steam vessel

being navigated under the command of competent officers, they had no means of determining. The only duty resting upon them was to exercise reasonable care in the light of the circumstances. They were then proceeding at a speed little more than sufficient to give them steerageway, and they did the manifestly proper thing, namely, stopped the engines of the "Tillicum." This, with a square-bowed barge lashed to her side, would cause her momentum through the water to rapidly diminish. If the object ahead were not in motion or were a sailing vessel, it was the only way in which they could navigate with due care to ascertain the position and whereabouts of that object and take the necessary precautions to avoid it. If, on the other hand, the object ahead of them were a steam vessel being navigated by competent officers, they had the right to assume that it would be operated at a similar rate of speed and with like precautions. If such had been the fact, no collision would have occurred.

After the engines were stopped another fog whistle (one long and two short blasts) was given at the usual interval, when the echo was again heard directly ahead. They thereupon signaled the engineer to reverse full speed astern. At the same time the master, seeing the glimmer of a light ahead, gave the danger signal, followed by three blasts, signifying that his engine was reversed (Apostles, pp. 85, 86).

When the lights of the "Rosalie" were first seen they were estimated by the master of the "Tillicum" to be distant about 200 feet (Apostles, p. 91).

When these signals were given the engines of the "Tillicum" had been stopped for approximately a minute. Proceeding as she had been for some time at a speed of only three knots an hour, and towing by her side a square-bowed barge 28 feet in width, her momentum must have been largely overcome at the time when her engines were reversed. On this subject the engineer testifies: "She would not be making over a mile an hour; not that I don't suppose" (Apostles, p. 105); and the fireman, Biggs, testifies that at the time when her engines were reversed "she was going pretty slow; she was very near stopped" (Apostles, p. 180). Her engines were reversed for fifteen or twenty seconds before the collision occurred (Apostles, p. 106). The engineer says: "She turned up three or four hundred revolutions before the collision. I think that would give her sternway, headway astern" (Apostles, p. 105). Both Captain Charlesworth and Pilot Anderson testified that before the collision they saw the water churning away from the bow of the barge and the tug (Apostles, pp. 86, 98, 99).

By these facts we think it clearly appears that the "Tillicum" and her barge were making sternway and that the collision was caused solely by the momentum of the "Rosalie." This conclusion is confirmed by the application of the simplest laws of physics to the facts in this case. The "Rosalie" was a vessel of 318 gross tons. The collision was between her and a flat-bottomed barge 28 feet wide and 100 feet long, carrying two oil tank cars. The

gross tonnage of the barge and her cars is not given, but it could not well have exceeded twenty or twenty-five tons. The momentum of a moving body is the product of her weight and speed. At a given speed the momentum of the "Rosalie" would therefore be twelve times as great as the momentum of the barge. According to the testimony of the "Rosalie" the force of the blow was sufficient to split her stem and apron from the guards down to the forefoot. These were heavy oak or fir timbers covered in front by a stem iron. The force of the blow to the barge is equally significant. Her oil tanks were located on parallel rails so situated as to place the weight in the rear part of the barge, the front end being about three feet higher than the rear (Apostles, p. 101). These cars were lashed to the barge by four heavy galvanized iron chains, on each side, three-quarters of an inch to an inch in thickness (Apostles, pp. 88, 93). The barge was lashed to the "Tillicum" by two spring lines. The blow of the collision was sufficient to part the spring line ahead, thus letting the barge swing away from the bow of the "Tillicum" (Apostles, pp. 99, 100), and to drive the barge back with such force as to break these heavy galvanized iron chains and forge the cars ahead up the inclined rails so that the forward truck of the front car was propelled over the front end of the barge and dropped into the water. The force of this collision was so great that it needs but a moment's calculation to show it must have been caused by the momentum of the "Rosalie."

III.

Sufficiency of Lookout of "Tillicum."

(Assigments First and Second.)

Capt. Charlesworth, master of the "Tillicum," acted as lookout and was stationed in the pilot house, which was about sixteen feet above the water and twelve feet back of her bow. On account of the fog he was unwilling to intrust this duty to another (Apostles, p. 170). Since Capt. Anderson, a licensed pilot, was on duty in the pilot house navigating the vessel, until the collision became imminent, the trial court did not question the competency of the lookout.

The fault was held to consist in the fact that the lookout of the "Tillicum" was not properly stationed, and the reason is thus assigned in the opinion of the court:

"The court cannot say that in a dense fog such as this was, that the lookout could have a better point of observation from the pilot house than from the bow of the boat. I think that in the towing of this scow, the lookout should have been stationed as far forward on the sailing craft as possible. * * * The safety of life and property requires that a tug in towing a scow in the manner shown with the bow of the scow from twelve to thirty feet forward of the bow of the tug, in a dense fog, must have a lookout stationed farther forward than in the pilot house."

The duty of a vessel to carry a proper lookout arises from the obligation to exercise due care. Neither the duty nor the mode of exercising it is prescribed by statute law. It has in admiralty long

been the established rule of due care that vessels navigating in a fog or in the nighttime where there is danger of a collision shall have a competent lookout stationed in a suitable place to see and hear approaching vessels and to report the fact to the navigating officer. Whether the lookout is sufficient or is properly stationed is a question of fact in each particular case.

The Pocomoke, 150 Fed. 197.

The sole question here under consideration, therefore, is whether under the facts of this case the stationing of the lookout in the pilot house was the exercise of due care.

Rule 38 of the General Rules and Regulations prescribed by the Board of Supervising Inspectors, which under an Act of Congress have the force of law, provides:

"All passengers and ferry steamers shall, in addition to the regular pilot on watch, have one of the crew also on watch *in or near the pilot house; and this rule applies to all steamers navigating in the nighttime.*" (R. S. § 4405.)

The rule plainly recognizes that the pilot house is a suitable place for a lookout. We do not contend that it will necessarily be sufficient to have a lookout so stationed. What constitutes due care must depend upon the circumstances of each particular case. The size of the vessel or the circumstances of its navigation may require that a lookout be stationed at the bow, or the stern, or, indeed, that one be stationed at each of these places. In

view of the size of the "Tillicum" and the nature of its bow, it is evident that her pilot house afforded the best opportunity both to see and to hear. This is confirmed by the testimony of the master of the "Tillicum" (Apostles, p. 170), of the mate (Apostles, pp. 174, 175), of R. A. Turner, local inspector (Apostles, p. 176), and also of Captains Smith and Ackles, licensed masters and pilots (Apostles, pp. 178, 179). No testimony was offered to dispute this evidence.

Moreover, the testimony in this case discloses that Capt. Charlesworth saw the lights of the "Rosalie" before either the lights on the barge or the "Tillicum" were visible to the lookout on the bow of the "Rosalie" or the officers in her pilot house (Testimony of Capt. Charlesworth, Apostles, p. 85; Pilot Anderson, p. 96; Lookout Bougojard, p. 19; Mate Hanson, p. 33).

The only question remaining, then, is: Could the lookout have heard better on the bow than in the pilot house? The testimony shows that there would have been more interference from noise in the former place. The trial court, in dealing with these questions, says:

"The further contention that a person could see and hear better from the pilot house because of its elevated position than from the bow of the vessel, I think, is answered by the testimony in this case, which shows that the fog was general. If the testimony should disclose that the fog bank lay near the water and that the pilot house extended above the fog, the contention might have some force."

This conclusion disregards both the facts and the well-known aberrations of sound in fog. The latter subject has afforded a wide field of scientific inquiry. (Moore on Facts, § 273.)

There is in the facts of this case no room for an inference that if the lookout had been stationed on the bow of the "Tillicum" he could either have heard or seen the "Rosalie" better or appreciably sooner; or if he had been so stationed that the "Tillicum" could have been so navigated as to avoid the collision. Her lookout should, upon the facts in this case, be held sufficient to comply with her obligation to exercise due care.

The Ping-On v. Blethen, 11 Fed. 607.
McFarland et al. v. Selby Smelting & Lead Co., 17 Fed. 253.
The Pocomoke, 150 Fed. 193.
The Caro, 23 Fed. 735.
The Ship Shakespeare, 4 Benedict, 128.
The Steamer Hansa, 5 Benedict, 501.

IV.

Division of Damages.

(Assignments Fifth and Sixth.)

It will be observed that the trial court did not expressly find that the "Tillicum" was guilty of a fault which contributed to the collision. What it did find was that its lookout was insufficient because not stationed farther forward than the pilot house. From this fact the court concluded that "the 'Tillicum,' not having shown that such fact did not

contribute to the disaster, must be held to have contributed to the collision," and hence that the damages should be equally divided. In thus holding the court proceeded upon an erroneous view of the law.

Even if it be conceded, in the face of the positive and undisputed evidence of expert witnesses, that a more suitable and appropriate place for the lookout under the circumstances of this case was on the bow of the "Tillicum" or upon the barge, it does not follow that the fact that the lookout was stationed in the pilot house instead was such a want of due care as directly contributed to the collision. The purpose of the lookout is to see and hear in fog or darkness and to report the presence of dangers to be avoided. In such a fog as then prevailed the things to be seen are the lights of an approaching vessel, and the things to be heard, her whistles. Each in the case of the "Rosalie" was located at an elevation greater than the pilot house of the tug. The distance of either to any suitable place for a lookout on the bow of the tug or the barge in a direct line would not be appreciably less than the distance to the eye or ear of the master standing in the pilot house. Without reference to the positive evidence on the subject given on behalf of the "Tillicum," it is difficult to conceive that either the lights or the whistles of the "Rosalie" could have been seen or heard and reported by a lookout stationed as the trial court suggested, so as to have enabled the tug to act more promptly or to do more than she did to avoid the collision.

It cannot be said, therefore, that the fault ascribed to her by the trial court was a contributing fault.

The Elk, 102 Fed. 697, 698.

The Bluejacket, 144 U. S. 371, 389.

In the former case it is said:

"The law is well settled that the absence of a special or proper lookout does not subject a vessel to liability for damages for collision, unless such absence has in fact contributed to the collision."

It is established by the undisputed facts in the case that the speed of the "Rosalie" was so grossly excessive that the collision under the circumstances was inevitable after the tug discovered her proximity. If the "Rosalie" stopped and backed, as claimed by her witnesses, her speed in entering the fog prior to such manoeuvers must have been considerably in excess of nine knots an hour. Capt. Barlow, the master of the "Rosalie," testified that if he stopped the engines when his vessel had a speed of seven or eight knots an hour "in that kind of weather she would carry her headway about seven minutes" (Apostles, p. 69). He also testified, "in calm weather we figure on making a landing, * * * in four minutes from the time I slow down until I stop and take the slip" (Apostles, p. 69). He was then asked:

"Q. If you were going full speed ahead and you were to stop and give a signal full speed astern, how long would it take you before you were making sternway?

A. A little less than two minutes." (Apostles, pp. 69, 70.)

The most that is claimed by the witnesses of the "Rosalie" is that she stopped about a minute and reversed about a minute. On this subject Capt. Hanson, navigating officer of the "Rosalie," testified, on direct examination:

"Q. How long, captain, to your best judgment, do you think you had been backing your boat before you came in contact with that scow?

A. Backing about a minute." (Apostles, pp. 33, 34.)

Bougojard, the lookout, testified that after hearing the second whistle of the "Tillicum" (when Mate Hanson claims to have reversed his engines) it was about a half minute or less until the next whistles were heard from the "Tillicum" (Apostles, p. 27). And this is confirmed by Gates, the man at the wheel (Apostles, p. 62). From that time it appears to have been only fifteen or twenty seconds until the collision occurred.

The lookout naively said in his direct examination: "We hit the barge a glancing blow" (Apostles, p. 20). Mr. Kinsey, the engineer, asked if he knew when they came into collision, said: "Yes, I felt them stop" (Apostles, p. 48); and Gates, who was at the wheel, testified: "I could not see exactly from where I was *where she struck the tow*" (Apostles, p. 63).

Hence it is apparent that at the excessive speed at which the "Rosalie" entered this fog, with the knowledge that a steam vessel was approaching slightly on her port bow, the collision was inevitable.

The "Rosalie" was guilty of gross negligence.

Her fault was sufficient to account for the disaster; and unless she has made it clearly appear that the "Tillicum" was guilty of a fault, but for which the collision would not have happened, she must be held solely responsible therefor.

The Nacoochee, 137 U. S. 330, 338, 339.
The City of New York, 147 U. S. 72, 84, 85.
The Ludvig Holberg, 157 U. S. 60, 71.
The Umbria, 166 U. S. 404, 409.
The Pallanza, 189 Fed. 43.
The Thielbek, 218 Fed. 251, 254.

In the case of *The Nacoochee (supra)* the steamer entered a fog at a speed of six or seven knots an hour. She later discovered a schooner approaching at a distance of about 500 feet, and she was unable to overcome her momentum in that distance by reversing her engines. The Court said:

"She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog." (Citing authorities.)

It was, however, contended that the schooner was at fault in sailing too shorthanded in a fog and in having an insufficient lookout; but the Court held that "the steamer was bound to keep out of the way of the schooner, and the burden rests upon her to show a sufficient reason for not doing so. She must be held wholly responsible, unless she shows a fault on the part of the schooner which contrib-

uted to the collision, or that it was due to unavoidable accident." (p. 338.)

In *The City of New York (supra)* a collision occurred in a fog between a steamer and a schooner. The steamer was running at her usual speed. Mr. Justice Brown in that case said:

"Upon the findings of the Circuit Court there can be no question of the gross negligence of the steamship. She was not only not running at the moderate speed required by rule 21, but she failed to take the proper precautions when the proximity of the sailing vessel became known to her."

Referring to the contention that the schooner was likewise at fault, the Court said (p. 85):

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

The case of *The Umbria (supra)* in certain respects resembles the case at bar. The Umbria was proceeding in a fog at a grossly excessive speed. It was contended that the Iberia was at fault in changing her course. Mr. Justice Brown, in the course of his opinion, says:

"Indeed, so gross was the fault of the Umbria in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York,* 147 U. S. 72, 85, and *The Ludvig Holberg,* 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

It seems clear, therefore, that under the facts of this case and the applicable rules of law, as announced by the Supreme Court of the United States, the trial court erred in entering judgment against appellant for one-half the total damages.

V.

The Damages of the "Rosalie."

(Assignments Ninth and Tenth.)

Even if this Court should uphold the conclusion of the trial court that both vessels "must be held to have contributed to the collision," we respectfully contend that the damages found to have been suffered by the "Rosalie" are grossly excessive.

Broadly speaking, these damages as asserted are are of three classes: (1) The alleged cost of her repairs; (2) the wages claimed to have been paid to the crew retained on her during the period of repairs; and (3) demurrage.

The first and second appear to have been allowed in full by the trial court in the amounts of the bills rendered, which are, respectively, $3385.32 and $130.80; the demurrage representing the balance, to-wit, the sum of $1600.00.

(1) The libelant in the first instance introduced evidence that a survey of the "Rosalie" was made after the collision and that the libelant paid the bill of Heffernan Dry Dock Company for making the repairs called for thereby. The bill was introduced in evidence as libelant's exhibit "B," which is an itemized bill aggregating $3385.32. The bill appears upon its face to be excessive in certain particulars. For example, it appears from the bill that the vessel was in dock for repairs six days. The number of hours charged in the bill for labor on this work would have required, at eight hours per day for each man, that more than sixty men should be engaged daily during this time in making the repairs. No evidence was offered by libelant, in the first instance, as to the necessity or the value of the labor and materials which compose the items of the bill.

The appellant introduced in evidence the survey of libelant's surveyors, describing the injuries and containing the recommendations for repairs. Three experienced shipbuilders were then examined (M. H. Sandstrom, Apostles, pp. 119-130; A. M. McKay, pp. 131-137; John L. Hubbard, manager of Hall Brothers' shipyard, pp. 137-146). These witnesses each examined the itemized bill in the light of the requirements of the survey and pointed out wherein the items were unnecessary for the repair of the injuries caused by the collision or were excessive. Sandstrom and McKay testified that the work could be reasonably done for $850, including the docking, and that they would have been willing

to take the contract for that sum. Hubbard testified that a maximum sum would have been $1050, for which he would have gladly taken the contract, and that the probable expense would not have exceeded $900 to $950. Chas. Redmond (Apostles, pp. 146, 147) and Charles Martin (Apostles, pp. 148, 149) were also examined on behalf of appellant and testified that they had performed work in making these repairs. From the testimony of all these witnesses the conclusion must be reached that the bill of libelant for the repairs was grossly excessive and that if the material and labor were supplied to the "Rosalie" they must have covered repairs and betterments not occasioned by the collision. Joshua Green, president of libelant company, admitted that other repairs were made at the time (Apostles, p. 79).

(2) The item for $130.80 for the ship's crew should not be charged as an expense incident to the collision. Frank Walker, one of libelant's surveyors, testified that the "Rosalie" had lost her propeller on a previous occasion and a temporary one had been installed, awaiting her regular docking, and that a new propeller was installed on this occasion *by the crew of the "Rosalie"* (Apostles, p. 165). Mr. Green testified, "in looking that up I found there were some of these repairs that had nothing to do with this collision at all. Probably repairs to the engine or some part of the stern, that were not connected with this" (Apostles, p. 79). If a portion of the crew was retained on the "Rosalie,"

as here appears, for the purpose of doing other work or making necessary repairs on the vessel, their wages should not be included in the present claim. Since no attempt has been made to show what part, if any of this bill, was necessarily incurred by the collision, no portion of it should be allowed.

(3) Demurrage. It clearly appears from the testimony that this occasion was made use of by libelant for installing a propeller, making certain necessary repairs, and giving the "Rosalie" her annual overhauling and repainting. Since no attempt was made by libelant to show what additional time, if any, the "Rosalie" was withheld from service, in consequence of the collision, no proper foundation is laid for the demurrage claimed.

The claims of libelant are so unreasonable and excessive that they suggest a practice, not altogether uncommon in such cases, of attempting to repair and renew an old ship at the cost of another than the owner.

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In conclusion, the disparity between the respective claims for damages is so great, and the fault of the "Rosalie" so clearly established, that a court should hesitate to apply a rule which would divide the damages equally between the two vessels.

Jacobsen v. Dalles P. & A. Nav. Co., 106 Fed. 428.

To paraphrase the language of the Court in the case of *The North Point,* 205 Fed. 958:

"The action of the (Rosalie) in thus navigating in a fog in plain violation of the rules, is sufficient to and does account for the happening of the occurrence; and hence she cannot escape responsibility for her negligent acts by attempting to place doubt upon the conduct of those navigating the (Tillicum). The burden would be clearly upon the (Rosalie) to establish such negligence, and that it brought about the disaster, in order to hold the (Tillicum) liable in whole or in part for the collision, which burden she has plainly failed to meet."

In the case of *The Transfer No. 8,* 96 Fed. 253, it is said:

"The fault of the Waterman is so glaring, and its consequences precipitated a situation involving such difficulties, that we are not inclined to be severely critical of the maneuvers by which the Transfer undertook to escape from it."

See also:

The Chicago, 125 Fed. 716.

In the language of Judge Adams in the case of *The Ashbourne,* 181 Fed. 815:

"There has been a strong disposition manifested on the part of the courts recently to let the blame rest where it principally belongs."

Under the facts and the law of this case, we respectfully submit that the claim for damages made by the libelant should be rejected, and that the owner of the "Tillicum" should be allowed to recover the damages proven herein.

Respectfully submitted,

HUGHES, MCMICKEN, DOVELL & RAMSEY,
Proctors for Appellant.